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**No. 5715**

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

A. B. HUMPHREY COMPANY  
(a corporation),

vs.

BEN H. ARKELIAN and BEN H.  
ARKELIAN & Co. (a copartnership),  
*Appellees.*

*Appellant,*

In Equity  
Infringement of United  
States Registered Trade-  
Mark No. 186,739, July  
22, 1924, "Lady Fingers"  
for Fresh Grapes.

**BRIEF FOR APPELLANT.**

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Crocker Building, San Francisco,

*Attorneys for Appellant.*

**FILED**

**MAY 28 1929**

**PAGE P. O'BRIEN,**

**CLERK**



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Mark No. 186,739, July  
22, 1924, "Lady Fingers"  
for Fresh Grapes.

## BRIEF FOR APPELLANT.

### STATEMENT OF FACTS.

This appeal is prosecuted from a decree (R. 31) entered by Judge St. Sure, sitting in the District Court for the Northern District of California, dismissing plaintiff's bill for infringement of the registered trademark\* "Lady Fingers" as applied to fresh grapes. No opinion was rendered so we are left in doubt as to the grounds for the decision.

Plaintiff's assignor and President, A. B. Humphrey, adopted the name "Lady Fingers" as an arbitrary

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(Appellant is referred to as "plaintiff" and the appellees as "defendants." "R" indicates the printed record page. All italics herein, unless otherwise specified, are ours.)

\*See Plaintiff's Exhibit 1, Trademark Registration, No. 186,739, registered July 22, 1924.



trademark for fresh grapes in the year 1895 (R. 35) and has used the same continuously ever since in the shipment of large quantities of grapes to Eastern markets, showing conclusively interstate commerce over a period of nearly thirty years. Plaintiff applied the mark both by means of a rubber stamp affixed to boxes, and by labels and circulars attached to the boxes and to the cars containing this particular kind of grape that plaintiff sells under the trademark "Lady Fingers." There is in evidence the record of a stamp-manufacturer as plaintiff's Exhibit "5" showing the making of the rubber stamp containing the name "Lady Fingers" as early as August, 8, 1904. (R. 69.)

For twenty or twenty-five years plaintiff's use of its mark "Lady Fingers" was exclusive in every sense of the word; the first time Mr. Humphrey ever heard of anyone else using that word was in 1918 or 1920 (R. 39); this information coming through his agents in the East. (R. 54.) Who these infringers might have been does not appear, but it does appear that the infringement was promptly discontinued, by reason of plaintiff's alertness in asserting his rights to the mark. When we come to review the testimony we will see not only how continuous has been the use of the mark by the plaintiff and how generally the mark has been respected by the trade, but how recent, wilful and injurious the infringement has been by the defendants.

### TRADEMARK REGISTRATION.

The trademark "Lady Fingers" was registered according to the Act of February 20, 1905, as amended February 18, 1909,\* wherein and whereby it was asserted that the registrant had adopted and used the words "Lady Fingers" as a technical trademark for fresh grapes and had used the same in interstate commerce since September 1, 1895, and that the mark had been applied by being stamped with a rubber stamp directly on the boxes containing the goods or in any other suitable manner.

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### USE MUST PRECEDE REGISTRATION; USE CREATES THE RIGHT.

As said by Judge Wolverton in *Heileman Brewing Co. v. Independent Brewing Co.*, 191 Fed. 489 (9 C. C. A.) (page 494):

"\* \* \* in this country a trade-mark is acquired by use, and the use must antedate registration. Without it registration cannot be had. By section 1 of the act of February 20, 1905, supra, the owner of a trade-mark domiciled in this country is entitled to have the same registered, and by section 2, in order to procure registration, he must show that such trade-mark is used in commerce among the several states or within foreign countries. So that registration comes only after acquirement of the right to a trade-mark by use. See, also, Hopkins on Trade Marks, Sections 25-27."

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\*Trade-Mark Act February 20, 1905, c. 592, Sec. 5, 33 Stat. 725 (U. S. Comp. St. Supp. 1911, p. 1461).

## FEDERAL JURISDICTION.

It is by virtue of this Federal Registration (Sections 17 and 19),\* and the fact that defendant shipped fresh grapes bearing the infringing trademark to Portland, Oregon (R. 39), that this suit is brought in a Federal Court.

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## ATTRIBUTES OF A REGISTERED TRADEMARK.

Of course a trademark is entitled to protection independent of registration. Registration, however, following due examination and scrutiny by the officials of the Patent Office, and a statutory declaration (Section 16)\*\* of *prima facie* ownership gives rise to an added **presumption of validity**, just as with patents.

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\*Sec. 17. That the circuit and territorial courts of the United States and the supreme court of the District of Columbia shall have original jurisdiction, and the circuit courts of appeal of the United States and the court of appeals of the District of Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trademarks registered in accordance with the provisions of this act, arising under the present act, without regard to the amount in controversy.

Sec. 19. That the several courts vested with jurisdiction of cases arising under the present act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trademark registered under this act, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trademark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. The court shall have the power to increase such damages, in its discretion, as is given by section sixteen of this act for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed.

"Sec. 20. That in any case involving the right to a trademark registered in accordance with the provisions of this act, in which the verdict has been found for the plaintiff, or an injunction issued, the court may order that all labels, signs, prints, packages, wrappers, or receptacles in the possession of the defendant, bearing the trademark of the plaintiff or complainant, or any reproduction, counterfeit, copy, or colorable imitation thereof, shall be delivered up and destroyed. . . ."

\*\*\*"Sec. 16. That the registration of a trademark under the provisions of this act shall be *prima facie* evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or



“Though the act does not provide that registration of a trade-mark is **prima facie evidence of its validity**, the Patent Office is not authorized to register anything but a trade-mark. Incidentally, therefore, registration involves the consideration by the Commissioner of Patents of whether the device for which registration is sought may be the subject of exclusive appropriation as a trade-mark. That officer’s decision of that proposition is entitled to respect as being *prima facie* correct.” (*Nims, Second Edition*, Section 240, page 459.)

In the *Trade-Mark Cases*, 100 U. S. 82, 94, 25 L. Ed. 550, 552, Mr. Justice Miller, speaking for the Court, says:

“The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. \* \* \* At common law the exclusive right to it grows out of its use, and not its mere adoption.”

Specimens of plaintiff’s trademark are in evidence as plaintiff’s exhibits “2” and “3” (R. 36-37); and a specimen of defendants’ infringement trademark “Ladyfinger” is in evidence as plaintiff’s exhibit “4.” (R. 42.)

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colorably imitate any such trademark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several states, or with a foreign nation or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.

It is to be noted that the defendants use the word "Ladyfinger" not only in a truly trademark sense but in a true trademark position, stamping it with a rubber stamp in conjunction with the picture of a young girl, and not using it in a descriptive sense or position as indicating the quality or name of the grapes themselves. The fact that defendants use the word "Ladyfinger" in conjunction with the more prominent mark "Enchantress" is immaterial.

Defendants' use of their own mark "Enchantress" and plaintiff's mark "Lady Fingers" on the same goods or on the same package does not alter the case nor prejudice plaintiff's rights. One mark or several different marks may be used on the same goods provided one has ownership. (*Loonew v. Deitsch*, 189 Fed. 487, 492; *Nims*, Section 194, page 382.)

The term "Lady Fingers" has become associated with plaintiff's business and that of its predecessor, Mr. Humphrey, as representing a grape which, if not originated by Mr. Humphrey, at least possessed certain peculiarities which have become, through long years, as particularly associated with the plaintiff and Mr. Humphrey. The fact that the grapes have a peculiar shape suggestive of the name given it by Mr. Humphrey in 1895 of course in nowise detracts from the merits of the trademark.

**“SUGGESTIVE” WORDS DISTINGUISHED FROM  
“DESCRIPTIVE” WORDS.**

The words “Lady Fingers” are not *descriptive* of grapes in any trademark sense of those words. Words that are “suggestive” and valid marks, are illustrated in a long list in “Nims on Unfair Trade,” Second Edition, pages 393-4; (Third Edition, pages 529-30) and including, for example:

“Ideal” for brushes (209 Fed. 37);

“Wearever” for cooking utensils (226 Fed. 815);

“Elastic” for book cases (121 Fed. 185);

“Sliced Animals” for a game or puzzle (93 N. Y. 59);

“Holeproof” for hosiery (172 Fed. 859);

“Vogue” for periodicals (261 Fed. 420).

Where the primary purpose of the mark, as here, was to indicate origin, it is immaterial if it might also in a secondary sense indicate grade or quality, for, as said in *Capewell Horse Nail Co. v. Mooney*, 167 Fed. 575, 586:

“It is immaterial that the mark indicates grade as well as origin, and is also ornamental, if the primary purpose of adoption and use was to indicate origin.”

See also,

*Dixie v. Stearns*, 185 Fed. 431.



A TRADEMARK WHICH LATER MAY BECOME, BY USAGE, THE APPELLATIVE OF THE ARTICLE DOES NOT THEREBY LOSE ITS TRADEMARK SIGNIFICANCE.

*Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94 (decision by Justice Bradley);  
*Fairbanks v. Central Lard*, 64 Fed. 133 (Cottolene case);  
*Morgan's Sons v. Ward*, 152 Fed. 690 (7 C. C. A.) (Sapolio case);  
*Lambert Phar. Co. v. Kalish Pharmacy*, 219 Fed. 323 (Listerine case).

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#### INFRINGEMENT OF RECENT DATE.

The defendant Arkelian while he testified (R. 106) that he started to grow so-called "Ladyfinger" grapes in 1920, does not say when he began shipping them. Apparently he did not get into production until some years later, as Mr. Humphrey testified (R. 39) that the first he heard of defendants' infringement was only about three years before bringing suit.

Mr. Humphrey immediately notified the defendant by letter of his registered trademark and requested that the infringement be discontinued. This warning was ignored by the defendants; hence the suit was commenced in September, 1927.

Bearing in mind that fresh table grapes are sold only for a short period each year, it is manifest that there has been no such delay on plaintiff's part in proceeding against defendants as would give rise to laches, especially in view of the timely personal notice given the defendants and the statutory notice



that has always appeared on the plaintiff's labels themselves.

The notice given by this plaintiff to the world of his trademark was quite sufficient, and it would be so even though he had given no notice other than affixing the mark to the goods.

“\* \* \* it is entirely immaterial that the complainant did not impress on each nail or each package or carton the words ‘This check mark is our trade-mark,’ or advertise the fact that it had adopted the check-mark as its trade-mark. It is true that such a notice would have given notice to all who read it that the check-mark was claimed as a trade-mark, but I know of no law which requires a person to advertise his trade-mark, or to put a notice on it or on the goods on which it is found stating that the trade-mark imprinted or attached is a trade-mark.” (*Capewell Horse Nail Co. v. Mooney*, 167 Fed. 575, 584.)

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#### THE INTENT OF THE DEFENDANT IS IMMATERIAL.

In *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 24, the Court said (pages 33-34):

“They call attention to the fact that there is no testimony that the defendant ever intended to deceive any one into the belief that its goods were those of the complainant and none that any purchaser ever was deceived. But this cause is based solely on the complainant's ownership of a common-law or technical trade-mark. If the defendant infringes the right to that trade-mark, which is valuable property of the complainant, if it trespasses upon that property, the complainant is entitled to an injunction against the continuance of that infringement, whether its infringement was or is intentional or not and whether the trespass

upon the complainant's property was or is injurious or not. Intent and damage are immaterial here. *Hutchinson, Pierce & Co. v. Loewy*, 163 Fed. 42, 90 C. C. A. 1; *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; *Gannert v. Rupert*, 127 Fed. 962, 62 C. C. A. 594.

\* \* \* \* \*

“The use of any simulation of a trade-mark which is likely to induce common purchasers, exercising ordinary care, to buy the article to which it is affixed as the product of the owner of the trade-mark, is an infringement of the owner's right and entitles him to equitable relief. *McLean v. Fleming*, 96 U. S. 245, 251, 24 L. Ed. 828; *Kann v. Diamond Steel Co.*, 89 Fed. 706, 711, 32 C. C. A. 324, 329; *Walter Baker & Co. v. Puritan Pure Food Co. (C. C.)*, 139 Fed. 680, 682.”

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#### TRADEMARKS FOR NATURAL PRODUCTS.

A table grape is in no different category from a trademark standpoint than other natural products, such as mineral waters, fresh fruits, walnuts, oranges, &c., which latter today are generally sold with a trademark directly stamped thereon or printed on a wrapper. Merely because some grower happens to acquire plantings similar to those producing the “Skookum” apple, or “Desert Sweet” grapefruit, is no justification for employing that trademark without the original owner's consent.

Inasmuch as the quality of any such natural product depends in a large measure upon the care devoted to its cultivation, the time and manner in which it is picked, and the care exercised in packing and shipping, particularly where it is a perishable

commodity like table grapes, it is a fraud upon the public for anyone whose operations are not carried on under the direct supervision and control of the original owner of the trademark, to offer his goods for sale under that name, even though the stock which produces the product may be the same.

"The fact that the trademark "Lady Fingers" is applied to grapes does not deprive plaintiff of a valid trademark for this natural product.

"It may also be laid down, upon reason and authority, that one who owns and controls the source of a particular natural product, such as a spring of mineral water, is entitled to be protected in the name given to that product, provided it is one otherwise subject to exclusive appropriation as fully and as completely as in the case of any artificial product of manufacture. *Contrass Spring Co. v. High Rock Spring Co.*, 45 N. Y. 295-300, 6 Am. Rep. 82; *Appollinaris Co. v. Sherer* (C. C.), 27 Fed. 18; *Hill v. Lockwood* (C. C.), 32 Fed. 389; *City of Carlsbad et al. v. Thackeray & Co.* (C. C.), 57 Fed. 18; *City of Carlsbad et al. v. Kutnow et al.*, 71 Fed. 167, 18 C. C. A. 24; *Northcutt v. Turney*, 101 Ky. 314, 41 S. W. 21; *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395." (*Manitou Springs Mineral Water Co. v. Schueler*, 239 Fed. 593, 599-600.)

"The same rules that apply to names of manufactured articles apply to the names of natural products which have been rendered valuable by the owner's brains and labor, such as names of natural springs. The Wisconsin court, on the petition of the owners of the 'Bethesda Mineral Spring' enjoined the use of the name 'Glenn Bethesda Mineral Water' where the owners of the latter made misleading representations as to the ownership of the spring of the plaintiffs, the defendant's spring being 1200 feet away from theirs, although the two waters were identical in



their character. The decision was based on the court's belief that 'the rules laid down in respect to an artificial or manufactured article are said to apply to the proprietorship of any peculiar natural product which a party may have acquired with the avails of his industry, sagacity, and enterprise; the owner or vendor of the one, equally with the owner or vendor of the other, having a right to the exclusive use of his mark employed in connection with sale of the commodity.' " (Citing *Dunbar v. Glenn*, 42 Wis. 118-35-1877.) (*Nims, Second Edition*, page 217, Section 110.)

Note also such trademarks as "White Rock" for mineral water; "Canada Dry" for ginger ale; "Sun-kist" for oranges; "Calmyrna" (contraction of "California" and "Smyrna") for figs; and "Kodak" for cameras.

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#### DEFENSES.

It is not clear from the record or the pleadings just what defendants depend upon for justification of their infringement. As near as we can make it out, the defenses may be summed up as follows:

(1) That because the trademark is applied to a natural product is not a valid trademark. The refutation appears *supra*.

(2) That assuming that it has true trademark characteristics, it is *publici juris* by reason:

(a) that the foreign synonym of "Lady Fingers" was used in Turkey and/or in Dalmatia prior to its adoption by Mr. Humphrey in 1895 as designating a particular kind of grape in those countries, although the proof in that regard is of a very suspicious and in-



adequate character, and the affirmative proofs show that neither plaintiff nor Mr. Humphrey knew of that fact, if such were a fact.

(b) That plaintiff occasionally gave to neighbors and friends a couple of cuttings of the vine from which plaintiff's "Lady Finger" grapes are grown, but with the admonition in each instance that although they could propagate grapes from these cuttings, they were not to call them by the name "Lady Fingers," and that as far as shown this admonition in every instance was followed.

(c) That within the last few years and quite recently and since plaintiff's mark has become widely known, certain publications have made random reference to the words "Lady Fingers" as denoting a variety of grape; it appearing affirmatively from the testimony that this was all without the knowledge or consent of the plaintiff.

(d) That quite recently, and within a few months prior to suit, the Horticultural Department of the State of California had made in an official publication a casual reference to "Lady Fingers" in a descriptive sense; but, as affirmatively shown, this use was protested by Mr. Humphrey (R. 58) and his rights recognized by Mr. Commissioner Hecke.

Whether a mark is *publici juris* depends on whether it belongs to the public as the common property of the trade and, therefore, not subject to appropriation by any one person, so that all men engaged in the business have an equal right to its use, belonging to no one individual either as a trademark or label. (*Corbin v. Gould*, 133 U. S. 308; 33 L. Ed. 611, 613.)

It is manifest that plaintiff's mark does not come in that category at all.

In defendants' brief below reference was made to the case of *Hoyt v. Lovett Co.*, 71 Fed. 173, but which is not in point. There the plaintiff was engaged in selling grape vines and the cuttings of the grape under the name "Green Mountain," to each vine or cutting was attached a tag bearing that name. Plaintiff's advertising stated: "This grape originated in the Green Mountains; hence its name." The Court held that the alleged trademark was descriptive, and furthermore, that the purchaser of the vines or cuttings from legitimate sources, which vines or cuttings bore the name "Green Mountain" had a right to sell the fruit under that name.

No such facts are to be found in the instant case, and plaintiff, in making a gift of a few cuttings to friends or neighbors, had no reason to expect that the recipients thereof would enter commercially into the growing or shipping of grapes marked "Lady Fingers," especially in view of the fact that the original and correct name of the grape is "Rish Baba;" and the further fact that **whenever Mr. Humphrey gave away a cutting he expressly told the recipient that "they could not call them Lady Fingers."** (R. 51.)

Moreover, the defendant is not one of those to whom plaintiff gave cuttings, and hence is in no position to claim a license or right to use the name "Lady Fingers." On the contrary, defendants were refused cuttings by plaintiff, and if they ever got any they acquired them from various sources. Defendants may

use the names "Rish Baba," "White Cornichon" or any other proper designating term depending on the varieties in their community.

(3) Another defense was that the term "Lady Fingers" has, within recent years and long after its adoption as a trademark by plaintiff and in a limited field, become a nickname for several varieties of grapes having the same generally elongated appearance, but known officially and by the public by the following names: the "Pizutello di Roma" Grape; the "Rish Baba" Grape; the "Olivette Blanche" Grape; the "Khandahar" Grape; the "White Cornichon" Grape, and several others.

"The unnecessary adoption of a part of a plaintiff's trade-mark—a part so substantial as to have become a trade-name or *nickname for the goods*—is generally regarded as an infringement. The use by a defendant of a trade-mark identical with the name which has been derived from a plaintiff's trade-mark proper, *and has become sufficiently descriptive of plaintiff's goods*, is the adoption of a mark which will cause its goods to bear the same name in the market. Neither subtractions from nor additions to a trade-mark proper will avoid infringement, when such imitation as is likely to lead to confusion still remains despite the changes. Hopkins on Trade-Marks, etc. (3d Ed.) Sec. 138, p. 321, and section 113, p. 279; Saxlehner v. Eisner, Mendelson Co., 170 U. S. 19, 33, 21 Sup. Ct. 7, 45 L. Ed. 60; Thomas G. Flant v. May Co., 105 Fed. 376, 44 C. C. A. 534; Gordon's Dry Gin Co., Ltd. v. Eddy & Fisher Co. (D. C.) 246 Fed. 954." (*Amson & Parson v. Narragansett Dairy Co.*, 252 Fed. 276.)



(4) Laches.

(5) Non-infringement, based apparently on the contention that plaintiff sometimes associates its name "Humphrey" with the registered mark "Lady Fingers," whereas the defendants associate the word "Ladyfinger" with the name "Enchantress." Plaintiff's registered trademark is "Lady Fingers" without accessory matter.

That there is no merit in any of these defenses is apparent from a mere reading of the record in the light of the law as to trademarks.

The words "Lady Fingers" are the exclusive property of the plaintiff whether with or without accessory matter. Plaintiff made that clear by his registration. Defendant makes much of the fact that plaintiff in its advertising associates its own name "Humphrey" along with the trademark "Lady Fingers"; in other words, that some of the advertising shows "Humphrey's Lady Fingers." The fact that the plaintiff associates its own name or other accessory symbols or words with its trademark "Lady Fingers" does not deprive plaintiff of its right to the trademark.

In the leading case of *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 24 (8 C. C. A.), before Judges Sanborn and Van Devanter, a similar situation was disposed of in the following language (page 29):

"Counsel insist that the complainant can maintain no right to the exclusive use of the annular band as a trade-mark because it and its predecessors always used it in association with words,



such as 'John Dwight & Co.,' and with pictures, such as that of a cow, or an arm or hammer, upon their labels and never alone. But there is no rule of law and no reason that makes the use of a trade-mark alone upon the labels or packages that present the goods of a manufacturer or dealer indispensable to its existence. Such a rule would greatly diminish, if not destroy, the value of all trade-marks. It is the province and right of the owner, and not of the infringer, of a trade-mark to determine what shall constitute his trade-mark, and his first adoption and continued use of it perfects his title to it. Nor does he lose his right to the exclusive use of the mark he selects and adopts by placing on the label or package with it other words and symbols to assist in presenting and selling the goods he makes or offers for sale. The complainant in its declaration for registration of the annular band clearly stated that the lettering and symbols commonly used by it with the picture of the band might 'be changed or omitted at pleasure without materially altering the character of the said trade-mark the essential feature of which is the annular band.'" The fact that the owner of a trade-mark uses in association with it accessory symbols or words does not deprive him of the right to it. *Walter Baker & Co. v. Delapenha* (C. C., 160 Fed. 746, 750; *Bass, Ratcliff & Gratton v. Feigenspan* (C. C.), 96 Fed. 206, 212; *Walter Baker & Co. v. Puritan Pure Food Co.* (C. C.), 139 Fed. 680, 682."

The first use of a trademark gives to the prior user the exclusive right to its use in trade to a commodity to which it is applied. (*Metcalf v. Hanover Star Milling Co.*, 204 Fed. 211, 216 (5 C. C. A.).)

The fact that the plaintiff sometimes associates the word "Humphrey" with the words "Lady Fingers" does not diminish plaintiff's rights, for, as said in

*President Suspender Co. v. MacWilliam*, 233 Fed. 433, 438:

“Even if it be true that the habit of years has transformed the trade-mark ‘President’ into the trade-mark ‘Shirley President’ yet it is also true that another man who manufactured the same thing under the name ‘President’ would infringe upon the trade-mark ‘Shirley President.’ *Foster v. Foster*, L. R. 7 (Chan.) 611; *Saxlehner v. Eisner*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60.”

In *Menendez v. Holt*, 128 U. S. 514, our Supreme Court said:

“Holt & Co., then, having acquired the exclusive right to the words ‘La Favorita,’ so applied to this particular vendible commodity, it is no answer to their action to say that there was no invasion of that right because the name of S. O. Ryder accompanied the brand upon flour sold by appellants, instead of the name of Holt & Co. That is an aggravation and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor. *Gillett v. Esterbrook*, 47 Barb. 455; s. c. 48 N. Y. 574; *Coats v. Holbrook*, 2 Sandf. Ch. 586.” (32 L. Ed. p. 526.)

There are certain other general principles regarding trademarks that are too well known to need comment, and the application of which to the case in hand is instantly apparent.

The fact that the trial Court by its decree has denied plaintiff relief and found the trademark and the United States certificate of registration each void and of no force or effect requires a more particular consideration of the facts of this case than would seem otherwise to merit.

We submit that a mere reading of the record ought to demonstrate to anyone the lack of any merit for such a decree, and that if anyone ever had a perfectly good trademark that is entitled to protection, it is this plaintiff.

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#### HISTORY OF THE TRADEMARK "LADY FINGERS."

Mr. Humphrey, who is an agriculturist and horticulturist of high standing, testifies (R. 34) that he is 65 years of age, resides in Sacramento County and is president of the plaintiff corporation which was organized in 1917 or 1918; that the company does a general agricultural business, including the growing of grapes of all varieties; that the grapes are shipped in a green state entirely to all the large markets, including the large auction markets of the East; that prior to the organization of the corporation he carried on the same business individually; that the grapes grown and shipped by plaintiff are raised in Sacramento and San Joaquin Counties; and that on a particular variety of grape marketed by him and plaintiff, the trademark "Lady Fingers" is used.

These "Lady Finger" grapes were developed by the plaintiff and the name was an arbitrary one given to the fruit of these particular vines. The name was suggested by the shape of the grape. (R. 35-36.)

Regarding Mr. Humphrey's adoption of the words "Lady Fingers," he stated (R. 36):

"I made that decision in 1895. Prior to that time I had never heard of the name 'Lady Fingers' applied to grapes of any kind. I first shipped these grapes in 1898 and 1899. I sent a



sample, and wrote on it 'Lady Fingers,' to my agent in the east, asking for an opinion; and from that time on I used a stamp and stamped them 'Lady Fingers.' I got them in increased quantities from then on every year. I have continued to ship these grapes since that time and I always employed the name 'Lady Fingers' in connection therewith."

Mr. Humphrey testified (R. 36):

"I advertise the 'Lady Finger' brand of grapes by sending out what we call broadsides to the trade immediately before the season opens, through the east to the dealers, to the auction buyers, to the large chain stores, to the wholesale dealers and jobbers in the auction markets in the east."

As showing that the adoption of this mark by Mr. Humphrey was not the appropriation of any commercial name or a name then in use for grapes Mr. Humphrey testified (R. 37-38):

"I don't know by what name the grape was known when I first started the production of these grapes. If it had a name I had never seen it myself. I identified it as about one of 60 varieties of grapes that I had gathered up in an experimental way, seeking to find some new variety of grape with merit. I am not quite sure whether I obtained the vines or cuttings from which I produced the particular grape from the Department of Agriculture in Washington or whether it came from the University of California. It came, I think, from one of those two sources.

It is contended that this grape is a Persian variety. That I have learned since this controversy arose. The grapes are shipped in carloads to Chicago, New York and other auction markets and sold at auction; or, in some cases, they are



shipped to jobbers who represent me and sell them out to the dealers in small quantities.”

As showing the influence of imagination in suggesting a striking trademark for an article, it may be pointed out that at the same time that Mr. Humphrey adopted the name “Lady Fingers” for a certain variety of grapes, he also adopted the name “Baby Toes” for another because of its peculiarly suggestive shape (R. 67-68):

“Mr. CONLEY. Q. Do you ship any under the name ‘Baby Toes’?

A. Yes.

XQ. For how many years have you done that?

A. Ever since I have been producing them.

XQ. They are not listed in the Standardization Act, are they?

A. I don’t think so. Nobody raises them.

XQ. What is the real name of that variety?

A. I can’t say.”

\* \* \* \* \*

“XQ. Why don’t you try to market more ‘Baby Toes’?

A. They haven’t got the outstanding appearances of the grape, such as the one I discovered that is named ‘Lady Fingers.’ There are other grapes that are almost the same and just as good, and I never had any reason to believe that they had merits sufficient to justify propagating them like I do ‘Lady Fingers.’ ”

This popularity of “Lady Fingers” shows a reason for defendants’ infringement. It is a good seller under a good name and hence the inducement to infringe is the greater.

### INFRINGEMENT OF DEFENDANT OF RECENT ORIGIN.

For twenty-five years or more plaintiff continued to build up its business under this trademark without any molestation from any source, and it was not until about 1920 that Mr. Humphrey ever heard of anyone employing the name "Lady Fingers" on or in connection with grapes. (R. 39.)

Speaking of the years 1920-1924, Mr. Humphrey testified (R. 39):

"Prior to that time I never heard of anyone other than myself using this name 'Lady Fingers' on or in connection with grapes. *I first heard of the use of the name 'Lady Fingers' by the defendants Ben H. Arkelian and Ben H. Arkelian & Company within the last three years. Upon hearing that, I notified Ben H. Arkelian by letter that I had a United States Government trade-mark and asked him to cease using the name 'Lady Fingers' in connection with grapes. At that time he was shipping carloads; in one case that I recall, to Chicago and to Pittsburgh, and to the northwest—Portland.*"

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### INJURY BY VIRTUE OF THE INFRINGEMENT.

Mr. Humphrey testified (R. 40):

"After these larger shipments of 'Lady Finger' grapes by the defendant I noted a change in my business. In one case I had made a sale of five cars, I recall, to a cash buyer, and he had expected to handle them exclusively in the market, and he notified me before the first car came in that defendant was quoting a car through his agent in the market which would arrive the same day or possibly the day before, priced on arrival, which is a common practice in the trade. My representative in that market notified me that as

far as they could find out the price would be about 25 cents less per package than they had paid me, and they asked me what to do in the premises and protested; and the outcome of that was that I was compelled finally to make them a concession of 25 cents a package on the five cars."

The loss to plaintiff, occasioned by this one transaction of defendant's interference, amounted to as much as \$250.00 per carload. (R. 65.)

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**PLAINTIFF HAS ALWAYS JEALOUSLY GUARDED  
ITS TRADEMARK RIGHTS.**

Continuing, Mr. Humphrey testified (R. 40-41):

"Aside from my own company and the defendant here, there are a *number of other concerns producing a similar appearing grape*—in fact, all of the large companies have to ship similar grapes, and, as far as I know, the same grape, *and I have notified them, where I find it out in every case, to cease using the name, and in every case they have ceased using the name.* They call them, in some cases I know of, 'Rish Baba.'"

\*       \*       \*       \*       \*       \*       \*

Plaintiff had a perfect right of course to sell or give away cuttings, so long as plaintiff did not part with title to the name of the fruit grown from these vines. In other words, while anyone could grow fruit from these cuttings, they could not call the fruit so grown therefrom by the name of "Lady Fingers." Mr. Humphrey shows beyond question that in all cases where he gave away cuttings he made it clear that he neither gave nor transferred any right to the use of the words "Lady Fingers." In other words, the



same product would be marketed by another grower under another name.

This is exactly what takes place in the fruit canning industry where different canners buy, for example, the same variety of peaches and put them up under their particular house brands or the brands of their customers; or growers buy nursery stock of a particular variety from the nurserymen and sell the grown fruit under the grower's particular names.

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**PLAINTIFF'S VIGILANCE IN ASSERTING HIS RIGHTS AND  
PUBLIC ACQUIESCENCE IN PLAINTIFF'S EXCLUSIVE  
RIGHTS.**

Mr. Humphrey testified (R. 51):

“On an average of from three to six people each year have written me asking for cuttings of the so-called ‘Lady Finger’ vines, and I have given two cuttings to anyone who asked for them. *They were notified that they could not call them ‘Lady Fingers.’*”

(R. 53-54):

“Q. Are you the only producer of this variety of grape in the Sacramento Valley, ‘Lady Finger’ grapes?”

A. As far as I know.”

\* \* \* \* \*

“A. I have been told that in the last few years, since this came up, that there are people who are raising and shipping ‘Lady Finger’ grapes to some extent up in Kern County.

“I have been on the Arkelian place. I did not know he was raising these grapes, except from hearsay. His man showed me the grapes, the vines; they were too young, though, for me to know what they were; but his exact words were,



‘This is the so-called Lady Finger.’ I couldn’t tell by looking at them whether there were any grapes on the vine or not. I didn’t know whether he had authority to say what he was saying. He was a hired man and there was nobody else on the ranch. That was within the last four or five years.”

Concerning a recent State of California publication of the Horticultural Department, Mr. Humphrey testified on cross-examination (R. 58):

“XQ. I will ask you if you have ever seen this work at all? (Handing document to witness.)

A. I have only seen this in the last 18 months.

XQ. Yes. And you will notice that the name ‘Lady Finger’ appears there under the table varieties of grapes?

A. Yes. *And I protested to Mr. Hecke putting that name in there, told him he didn’t have any right to do that, and he said, ‘I didn’t know you had a trade-mark. We will take it out.’ He said that.”*

And at R. 62-63:

“Now, I believe you said that nearly everybody has ceased using the name ‘Lady Fingers’ in the state,—shippers of grapes?

A. Where I have notified them, they have.

XQ. Who have you notified?

A. The Earl Fruit Company and the California Fruit Exchange, who shipped about 12,000 cars, I think, a year. *They have notified their representatives and have notified their growers to market the grapes under a name other than ‘Lady Fingers.’ ”*

\* \* \* \* \*

“XQ. You never knew anybody in the San Joaquin Valley who changed the name since you made your protest?

A. I have been investigating the matter and I find that the order went out as a general order.

Q. From whom?

A. From the head offices of the Earl Fruit Company and the California Fruit Exchange and I can't recall right now—"

\* \* \* \* \*

On cross-examination Mr. Humphrey testified (R. 42-43):

"When I received these cuttings *I discarded the names in this particular lot, as I remember it, because they were so unpronounceable that I couldn't remember them*, and I put numbers on them,—1 to 10 on the first shipment, and the second year, from 1 to 20; and I copied the names in a book and I kept it for years; but my house burned up and the book was destroyed. I never used the names. I don't remember the particular name that was on the cutting of this particular grape. I am certain that the name 'Lady Finger' never appeared on those cuttings. *I never had heard of the name 'Lady Finger' before that.*"

\* \* \* \* \*

"A. I had never heard of a grape named 'Lady Finger.' "

\* \* \* \* \*

"We wrote the Earl Fruit Company protesting against the use of the name 'Lady Finger' and after one or two exchanges of letters they issued the order."

\* \* \* \* \*

"Q. Well, you don't know anything about it, whether they issued an order or not, do you?

A. *Except that the growers quit using the name 'Lady Fingers.'*

Q. What growers quit?

A. Specifically, I can't say. A man by the name of Humphrey, for one, who happens to be a neighbor of mine, but not a relative of mine, however; a man by the name of Winkelman, who shipped with the Earl Fruit Company."

And on rebuttal (R. 133) Mr. Humphrey testified:

*“A. Nobody has ever used that name ‘Lady Fingers’ except two people and they have a special license from me, ‘Shipped under the supervision of A. B. Humphrey Company’; and then they bring the fruit and put it in my cars, I put that on. If they pick the fruit and take it to somebody else’s packing-house, they have to put some other name on there, and they understand that.”*

Mr. Humphrey is corroborated by Geo. Winkelman (R. 70), a fruit grower and man of standing in his community:

*“The COURT. That he will testify he is a neighbor of Mr. Humphrey, and I suppose he is the man that has been given cuttings of these so-called ‘Lady Finger’ grapes and counsel now adds to what I stated, that he markets his grapes as ‘Rish Baba’ grapes and that he sells those grapes through the plaintiff.”*

On cross-examination Mr. Winkelman testified (R. 71-72):

*“As near as I can recall, I first observed these ‘Lady Finger’ grapes out at Mr. Humphrey’s place, the second year after it was grafted. It was grafted in the spring of ’94 and I saw the bunch of grapes in ’95.*

*\* \* \* \* \**

*And my recollection is and I have always understood that Mr. Humphrey called it ‘Lady Fingers’ on account of the shape of the berry.*

*\* \* \* \* \**

*A. I remember distinctly that the term ‘Lady Finger’ applied to the shape of the berry. That is my recollection.”*

And on redirect (R. 73):

*“The shipments I make of ‘Lady Finger’ grapes is now done under license of Mr. Hum-*



phrey. Mr. Humphrey gave me a stamp last year to mark the boxes with. I think it says, 'Packed under supervision of A. B. Humphrey Company.' They are shipped in Mr. Humphrey's cars. When I make shipments through the Earl Fruit Company, I stamp the boxes 'Rish Baba.' As near as I remember, Mr. Humphrey made his first shipments about 1898 or '99. I worked for Mr. Humphrey for 31 years.

\* \* \* \* \*

We never shipped any as 'Lady Finger' grapes except through Mr. Humphrey."

\* \* \* \* \*

"It is not important that the plaintiff does not himself manufacture the articles which he sells and upon which he places his trademark. It is sufficient that the goods are manufactured for him, and that he owns or controls the goods which he offers for sale, and upon which he places his trademark or trade-name. *McLean v. Fleming*, 96 U. S. 245, 253, 24 L. Ed. 828; *C. A. Briggs Co. v. National Wafer Co.*, 215 Mass. 100, 104, 102 N. E. 87, Ann. Cas. 1914C, 926."

(*Charles Broadway Rouss, Inc. v. Winchester Co.*, 300 Fed. 706, 722-23.)

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#### DEFENDANTS' SO-CALLED PROOFS.

As against the foregoing proof of adoption and use by plaintiff, and infringement by defendants, the latter's showing by way of confession and avoidance is weak indeed.

Defendants offered (R. 80) a definition of "Lady Fingers" appearing in a 1920 or 1921 edition of Webster's Dictionary as referring to "a variety of grape," without proof of origin or authority for the alleged information. (See the Listerine case, post.)



Next, a nurseries' catalog of 1921 or 1922 is submitted (R. 81) with a fugitive unproven, unauthorized reference to "Lady Finger" grapes. For aught that appears the catalogue may have been referring to plaintiff's trademarked product. Due objection was entered (R. 82) to these publications.

Another reference is made (R. 83) to an unproven publication entitled "California Horticulture" by Geo. C. Roeding whose earliest claimed date is 1909. (R. 83.) Any statement coming as long after plaintiff's adoption of its trademark and *without the authority of plaintiff* of course does not bind the plaintiff.

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#### DEFENDANTS' THEORY OF THE CASE.

Defendants' contention is manifestly this: That "Lady Fingers" is merely a "nickname" for *several different varieties of grapes*. But defendants overlook that a trademark is just that very thing.

"Nicknames are not confined to persons. Goods have nicknames; business houses have them. Oftentimes they are just as valuable as the full name of the goods or the formal name of the house, sometimes more valuable." (*Nims*, Section 56, page 100.)

Defendants do not even claim that the term "Lady Fingers" is merely the name of one particular variety of grapes. With several similar varieties to choose from, substitution is all the easier.

In defendants' brief below, it was said (pages 1-2):

"Defendants contend that a white grape known as 'Lady Finger' or 'Lady Fingers' has been grown and sold in the State of California for

more than forty years. The evidence shows that the name 'Lady Finger' includes a variety of grapes grown here in California, and that that name is given to the *Pizutello di Roma* grape, the *Rish Baba* grape, the *Olivette Blanche* grape, the *Khandahar* grape, the *white Cornichon* grape and several others. These particular names are not known to the people throughout the United States generally, although they appear in various catalogs issued by nurseries throughout the State and are mentioned in the California Fruit and Vegetable Standardization Act.

"It is safe to say that grapes of the Lady Finger variety were grown in Persia, Turkey and Austria long before A. B. Humphrey was born, and that they were given the name or names the translation of which is 'Lady Finger' or 'Lady's Finger.' "

That "Lady Finger" is not the scientific or viticultural name for these grapes is evident from a variety of sources. Prof. Bioletti, of the State University, claims that the grape to which plaintiff has applied the trademark "Lady Fingers" is known in this country and abroad as the "Rish Baba." (R. 60-1,76.)

Other grapes of a similar appearance were known to plaintiff but none were ever designated as "Lady Fingers" prior to plaintiff's adoption of the name.

Mr. Humphrey was asked (R. 143):

"MR. CONLEY. Q. You have told the Court now, as I understand it, that the name 'Lady Finger' is applied to 'Rish Babas,' 'Pizzutello di Roma' and 'Olivette Blanche'?"

A. I said in my experience I have known it to be."

That shows the very essence of true trademark existence; i. e. a specific mark for a general class of goods!

“LADY FINGERS” A TERM DESIGNATING ORIGIN  
WITH PLAINTIFF.

Mr. Humphrey testified on cross-examination (R. 50):

“The COURT. Q. Did they say that there were other brands of ‘Lady Fingers’ in the market?

A. Yes, and that the party was deceived because they couldn’t distinguish them without eating them.

Mr. CONLEY. Q. Were they the same variety of grapes?

A. In a great many cases they were not.

XQ. How do you know?

A. They were sent to me with the original boxes,—bought and sent to me and they carried the word ‘Lady Fingers’ and *they proved to be a different variety of grape from any other grape*,—either Rish Baba or from my kind of grapes or any other grapes that I know of.”

Defendants are, and always have been, at Liberty to mark their grapes with the name “Rish Baba,” or any of the other appropriate names open to them, and which marking would be in full compliance with State requirements.

Obviously, defendants’ only purpose in insisting upon a right to mark their grapes with the name “Lady Fingers” is to take advantage of plaintiff’s good-will and advertising. It is inconceivable that these defendants would go to great expense and trouble in litigating this question if, as they assert, their goods are intended to be sold solely as “Enchantress” grapes, and not as “Lady Finger” grapes.



### THE CELLULOID CASE.

In upholding the trademark "Celluloid," after it had become the designation by common usage of the substance now known as "Celluloid," Mr. Justice Bradley said (page 98):

"Secondly. As to the complainant's alleged right to the exclusive use of the word 'celluloid' as a trade-mark, and the defendant's alleged imitation thereof. On this branch of the case, the defendant strenuously contends that the word 'celluloid' is a word of common use as an appellative, to designate the substance celluloid, and cannot, therefore, be a trade-mark; and, secondly, if it is a trade-mark the defendant does not infringe it by the use of the word 'cellonite.'

As to the first point, it is undoubtedly true, as a general rule, that a word merely descriptive of the article to which it is applied cannot be used as a trade-mark. Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word 'flour' as his trade-mark, and prevent others from applying it to their packages of flour. I am satisfied from the evidence adduced before me that the word 'celluloid' has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: 'The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trade-mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellative of the substance manufactured, can take away the complainant's right.'

## THE "COTTOLENE" CASE.

*N. K. Fairbank Co. v. Central Lard Co.*, 64 Fed. 133.

"Cottolene" as a substitute for lard was sustained as a valid trademark and held infringed despite the fact that subsequent to adoption, the public had come to use it to denote the particular article; the Court saying (page 136):

"It is well settled that the inventor of an arbitrary or fanciful name may apply it to an article manufactured by him to distinguish his manufacture from that of others, and that the subsequent use of such word by the public to denote the article does not deprive the originator of such word of his exclusive right to its use. *Selchow v. Baker*, 93 N. Y. 59; *Ausable Horse-Nail Co. v. Essex Horse-Nail Co.*, 32 Fed. 94; *Manufacturing Co. v. Read*, 47 Fed. 712. Neither does the fact that the defendant sold under its own name, and made no attempt, other than by the use of the word 'Cottoleo,' to palm off his goods as those of the complainant, constitute a defense. *Roberts v. Sheldon*, 18 O. G. 1277, Fed. Cas. No. 11,916, and cases there quoted; *Sawyer v. Horn*, 1 Fed. 24; *Hier v. Abrahams*, 82 N. Y. 519; *Battle v. Finlay*, 45 Fed. 796. It seems to be the law that, when manufacturers have educated the public to ask for a certain article by its trade-mark name, they have acquired the right to insist that products manufactured by others shall not be given to the public under that name."

This word was again sustained as a valid trademark in *N. K. Fairbank Co. v. Ogden Packing & Provision Co.*, 220 Fed. 1002.

### THE "SAPOLIO" CASE.

*Enoch Morgan's Sons Co. v. Ward*, 152 Fed. 690 (7 C. C. A.).

The word "Sapolio" was adopted as a trademark as far back as 1869 and registered many years later as a trademark, yet as late as 1907, the date of the decision above, was found to be a perfectly good trademark although probably there has been no better known household article, and that there is not one user in a hundred who knows that there is only one genuine "Sapolio."

*Enoch Morgan's Sons Co. v. Whittier-Coburn Co.*, 118 Fed. 657 (C. C. N. D. Cal.).

Judge Morrow in the above case held that "Sapolio" was a valid trademark and infringed by defendant.

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### THE "LISTERINE" CASE.

*Lambert Pharmacal Co. v. Kalish Pharmacy*, 219 Fed. 323.

The trademark "Listerine" was held valid and infringed although prior to registration it had gained a place in the dictionary as meaning the particular article.

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### THE "CASCARETS" CASE.

*Sterling Remedy Co. v. Gorey*, 110 Fed. 272.

"Cascarets" was applied to a laxative remedy for a drug called in Spanish "cascara sagrada" meaning "bitter bark." The trademark was upheld as a valid



trademark, despite the suggestiveness of the product and the descriptive use by the public.

The word "Chartreuse" although used descriptively for hundreds of years abroad was upheld by the Supreme Court as a valid trademark. (*Baglin v. Cusenier Co.*, 221 U. S. 580; 55 L. Ed. 863.)

"Chartreuse" was not only the name that the public knew the drink by, but the word was geographical. It was a good trademark, however, because it referred exclusively to a product of the plaintiff.

It was very early recognized in the law of unfair competition and trademark infringement that the probability of misleading, not experts or persons who knew the real facts, but ordinary or unwary customers, is the mischief to be guarded against.

*Nims*, in quoting early English cases, says (page 20):

"The multitudes of ignorant and unwary must be regarded in considering the interest of traders who may be injured by the mistakes of purchasers. The plaintiff has a right whether founded on property in himself, or upon reasons of public policy which make it incumbent upon the courts to protect the public from deceit, to insist that his rival sell his goods in such a way as to insure the purchasers of them from deceit."

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#### ALLEGED PRIOR USES.

The prior uses within the United States pleaded, and repeated in the answers to interrogatories filed by defendant Ben Arkelian, have in no wise been proven. Even if these alleged uses of the term "Lady

Fingers'' by others than defendants actually occurred at the time claimed or even with the consent of the plaintiff, that would be no defense or excuse for defendants' infringement. (*Hub Clothing Co. v. Cohen*, 113 At. 677 (Sup. Ct. Pa. 1921).

In this connection plaintiff did everything possible in advance of trial to get defendants to commit themselves to a valid defense, and to that end filed interrogatories which were answered by defendant Ben Arkelian. (R. 12-15.)

These prior uses centered around the Eiseman Vineyards near Fresno; and plaintiff proved that no such grapes, nor, indeed, any grapes known as "Lady Finger" grapes, were ever produced on this vineyard during the many years that Mr. Baber was in charge.

The oral and uncorroborated testimony of K. Arkelian is that he knew of an elongated grape in Turkey and had heard the name "Hanan Parmaghy" applied thereto. Certainly that is not sufficient to overcome a vested right. Moreover, if this alleged Turkish name were a common appellation for a grape and meant "Lady Fingers," as the witness says, it would most likely have found its way into Turkish publications; but none such have been offered.

The same observations apply to the witness Cosulich and his story about the alleged Dalmatian words "Gospodje Peret."

This kind of testimony is considerably weakened by the offer of plaintiff to prove that the particular grape in question is of Persian origin and known in

its native country as "Rish Baba," meaning "Father's Beard." This proof was not presented, owing to defendants' agreement to stipulate the same.

Obviously, if the testimony of K. Arkelian or Mark Cosulich can be considered sufficient to destroy valuable vested trademark rights, then any trade mark of any character can be defeated and a plaintiff is put in a position where it cannot offer rebuttal proof on the simple say-so of a reckless witness. Note that neither witness testifies that the names "Hanan Parmaghy" or "Gospodje Peret" are to be found in any publication on viticulture, either in Turkey or Dalmatia; but they merely state, without corroboration, that they have heard that name applied to a grape. Obviously, such testimony need not, even if it could, be rebutted. Hearsay and uncorroborated oral testimony as to prior uses in a foreign country, would not overcome plaintiff's *prima facie* rights arising through registration.

"Section 51. UNFAMILIAR OR SCIENTIFIC WORDS USED AS NAMES OF GOODS. A name taken from a foreign language, may be descriptive to a person who is an expert linguist, or if the name be made up from chemical or other scientific terms, to one who is a trained scientist. To the public, such words are usually unintelligible and entirely non-descriptive, and appear to be artificial words. For instance, the names 'Pepto-Mangan' and 'Pepto-Manganate of Iron and Cascara' would not convey very different impressions to an unlearned man, while to a chemist they might convey very different meanings. On that ground they have been held arbitrary and fanciful names." Citing *M. J. Breitenbach Co. v. Spangenberg*, 131 Fed. 160. (Nims, Second Edition, Section 51, page 90.)



## BURDEN OF PROOF HEAVY ON DEFENDANT.

There is no reason in principle or justice why less stringent rules should be applied against a defendant trying to destroy a trademark and particularly a registered trademark, than applies to the case of prior use advanced in patent cases. The rule in such cases is well known to this Court.

But the same rule does apply in trademark cases as indicated by the Supreme Court in *Bourjois v. Katsel*, 260 U. S. 689, said:

“The monopoly in that case (i. e., a patent) is more extensive, but we see no sufficient reason for holding that the monopoly of a trademark, so far as it goes, is less complete. It deals with a delicate matter that may be of great value, but that easily is destroyed, and therefore should be protected with corresponding care.” (Page 466, 67 L. Ed.)

Further than that no authority can be found that even if the testimony of K. Arkelian or Mark Cosulich had established the fact that the names “Hanan Parmaghy” or “Gospodje Perst” had been applied to grapes in Turkey or Dalmatia prior to plaintiff’s first adoption and use of the name “Lady Fingers” in the United States, then such would constitute a defense to an action of this kind.

The testimony of the defendants’ witnesses can be mildly characterized as unreliable, particularly where it is shown in the one concrete instance that plaintiff could lay its hands on of alleged prior use, to wit, the Eiseman Ranch, that the facts were not as stated by the defendants’ witnesses.

Whether this is a case to apply the maxim: "*Falsus in uno falsus in omnibus*," is for the Court to determine.

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**FOREIGN USE, EVEN IF PROVEN, NOT A BAR TO A VALID UNITED STATES TRADEMARK.** (Gorham Mfg. Co. v. Weintraub, 196 Fed. 957, 961.)

"It has several times been held by the federal courts that a trade-mark used abroad may be adopted by one in this country in connection with a similar article provided its adoption was in good faith. Richter v. Anchor Remedy Co. (C. C.) 52 Fed. 455. And though British hall-marks are not strictly trade-marks, this rule is thought analogous."

Continuing the subject, the Court said (page 963):

"If this were an action by a British subject to enjoin infringement of the Birmingham hall-mark complaining that his property rights had been invaded, and it was shown that hall-marked silver ware had previously been imported into the United States, a different question would be presented for decision. And even in that case something more would be required to establish such right than an importation 'to a limited extent upon special orders, to supply particular customers.' Richter v. Anchor Remedy Co., supra; Kohler Mfg. Co. v. Beshore (C. C.) 53 Fed. 262; MacMahan Pharmacal Co. v. Denver Chemical Mfg. Co., 113 Fed. 468, 51 C. C. A. 302; Tetlow v. Tappan (C. C.) 85 Fed. 774. But in a litigation between citizens of this country it is to me perfectly plain that one cannot be permitted to infringe upon the prior rights of the other in a trade-mark by the use of which the latter has built up an extensive trade in a particular commodity."

Another leading case on the subject is the Perfume case (*Le Blume Import Co. v. Coty*, 293 Fed. 344 (2 C. C. A.) ) where the Court said (page 350):

“The record discloses that for over 100 years a perfume called ‘Origan’ has been manufactured or produced in Paris by the house of Renan, which still exists and is engaged in carrying on the business; and it also appears that many perfumers in Paris are at this time manufacturing a perfume called ‘Origan,’ but it is not disclosed, except in the case of Renan, when they commenced the manufacture of ‘Origan,’ whether before or after Coty put his perfume on the market. And in France these manufacturers of perfume invariably put their name after the name of the perfume, as ‘Origan-LaFleur.’ But the right of Coty to protect his trade-mark ‘Lorigan’ or his right to use ‘L’Origan’ upon his perfumes in the United States is not dependent upon whether he has any exclusive right to the trade-mark or to the trade-name in France. It cannot be denied that the protection of a trade-mark in the United States is not to be defeated by showing a prior use of a like trade-mark in France, or in some other foreign country. It is not essential that one who claims protection of his trade-mark should in all cases be able to show that he first used it. The prior use of a mark by another in some foreign country is not fatal, if the one claiming protection is able to show that he was first to use it in this country. *Gorham Mfg. Co. v. Weintraub* (D. C.), 196 Fed. 957; *Walter Baker & Co. v. Delapenha* (C. C.), 160 Fed. 746; *Richter v. Reynolds*, 59 Fed. 577, 579, 8 C. C. A. 220; *Richter v. Anchor Remedy Co.* (C. C.) 52 Fed. 455, 458.”

The Court then goes on to show that the reason for this is based on the “territorial limitations” of trademarks, saying (pages 350-351):



“It may be true that a trader can protect his trade-mark in all the markets in which he sells without respect to territorial limits, but it is not true that one who has acquired a technical trade-mark and used it in a limited territory thereby acquires a prior right to its use in an entirely different territory. Thus in *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 415, 36 Sup. Ct. 357, 361 (60 L. Ed. 713) the Supreme Court said:

“‘In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like.’

“And this doctrine was adhered to in *United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141. This is not a suit by a French manufacturer, who claims that because of previous sales under his French trade-mark, which he had made in the United States, he had acquired rights which made it unlawful for Coty to register here the same trade-mark. It may be quite true that prior to Coty’s registration of his trade-mark in the United States there may have been some casual importations to a limited extent of perfumes from abroad, but these occasional importations were so infrequent and inconsequential that it cannot be said that the producer of the goods had obtained a market for them here which entitled his trade-mark to protection.

“A casual sale or a casual importation does not establish or create a market, within the rule that

a trader can protect his trade-mark or trade-name in the markets in which he sells, and prevent another trader from adopting the same trade-mark or trade-name in that territory. *Menendez v. Holt*, 128 U. S. 514, 521, 9 Sup. Ct. 143, 32 L. Ed. 526; *Richter v. Anchor Remedy Co.* (C. C.) 52 Fed. 455, 456; *Kohler v. Beeshore*, 59 Fed. 572, 576, 8 C. C. A. 215. In *Eiseman v. Schiffer* (C. C.) 157 Fed. 473, the court sustained the validity of 'radium' as a trade-mark for silk goods, although it appeared that the word first came into use in Paris in connection with peculiarly lustrous fabrics, and was then taken up by many persons in this country for use in the same connection. That circumstance, the court declared, was immaterial, because the evidence showed that the party registering the word here was the first to use it in this country. See *J. & P. Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co.*, 74 Fed. 222, 20 C. C. A. 402; *Gorham v. Weintraub* (C. C.) 176 Fed. 927. And we have no doubt upon the evidence in this record that Coty was the first in the markets of the United States to use the words 'L'Origan' in connection with perfumes, with the possible exception of a few importations which were so casual that they may be ignored."

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#### **EISEMAN VINEYARD ALLEGED USE TOTALLY DISCREDITED.**

An effort was made on cross-examination of Mr. Humphrey to show that the words "Lady Fingers" had been used on a grape in connection with the vineyard known as the Eiseman Ranch. In regard to any alleged use there, Mr. Humphrey unqualifiedly testified (R. 44):

"I have been on the Eiseman vineyard, but I never saw any 'Lady Fingers.' I went over that vineyard on one occasion with Mr. Rennie, a well-

known vineyardist in Fresno, but I never saw a 'Lady Finger' grape or heard of a 'Lady Finger' grape being grown there."

The testimony of the defendant Ben Arkelian as to any alleged prior use of the words "Lady Fingers" on the Eiseman Ranch, and prior to 1895, or at any other time is not only unsatisfactory in quality but must be received with a good deal of caution. All he says on the subject is this (R. 106-107):

"I know the 'Lady Finger' grape. I have been growing that grape since 1920. Prior to that time I never made any sales of 'Lady Finger' grapes. I have about 110 acres of 'Lady Finger' grapes growing. Prior to the institution of this suit, I never heard that particular variety of grapes called by any other name than 'Lady Finger.' I first saw this variety of grape in my boyhood days when I was approximately 10 years of age. That was on the Eiseman Vineyard. At that time my father told me the name of the variety of grapes. He gave me the translation of the Turkish or Armenian word meaning 'Lady Finger.' I made a shipment of grapes to Portland, as testified to by Mr. Humphrey."

On cross-examination Arkelian admits (R. 106) that his father was not connected with the Eiseman Ranch and that *it was not until the year 1916 that he saw the name "Lady Fingers" on boxes of grapes, and he says that the first he ever heard of "Lady Finger" grapes grown by Mr. Humphrey was in 1919.* But we may well doubt that because he probably knew of it long before then. In any event if he heard of it in 1919, it did not take him long to start in imitating the name. Arkelian, however, does not find corroboration even by his own witnesses as to the use of the term



“Lady Fingers” even as a term of description on the Eiseman Ranch, because his brother, going by the name of Joseph Arkell testified (R. 103):

“I have been on the Eiseman Vineyard. I haven’t any recollection that there were ‘Lady Finger’ grapes being grown there; bu I know they were grown on the Margarita Vineyard.”

This last minute shift of defense from the Eiseman Vineyard to the Margarita Vineyard must likewise be accepted with a great deal of caution, particularly when Ben Arkelian is not only contradicted by his brother but by Mr. Edward I. Baber, a venerable and respected witness, who was on the Eiseman Ranch from the year 1880 to about 1916 or 1917 as manager. (R. 112.)

He testified (R. 112):

“Q. Did you ever know, during that period, of any grape being grown there on that ranch or vineyard and which was sold under the name of ‘Lady Finger’?”

A. Sold or marked ‘Lady Finger’?

A. **We never had such a grape. The vineyard never had such a grape; not under that name.”**

Mr. S. A. Lines, another highly respected citizen, fruit shipper and vineyardist who had been connected with the Earl Fruit Co. since 1902 or 1903 testified (R. 122):

“I am familiar with Eiseman ranch, near Fresno. I was manager of the Earl Fruit Company,—I was local agent in Fresno for the Earl Fruit Company about 1902 or ’03 and the Earl Fruit Company handled all the table grapes from the Eiseman Vineyard from that time until it was sold. I have been over that property many times.

In that connection I never saw or heard of any grapes called 'Lady Fingers' being grown there. I am familiar with the eastline portion that has been referred to here. I knew of no grapes grown on that portion or on the Eiseman Vineyard called or marked 'Lady Fingers.' I think I first became acquainted with the words 'Lady Fingers' when Mr. Humphrey made his plantings at Escalon. That must have been about 1912 or '13, during 1914, possibly; along in there. I am acquainted with the other vineyard that has been referred to here, the Margarita Vineyard. I have probably been over that property also, but not often; very seldom. I never heard of any 'Lady Finger' grapes being grown on the Margarita Vineyard."

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#### THE "ANTIPHLOGISTINE" CASE.

Even if there had been some casual use of the word "Lady Fingers" by the few people and in the manner testified to on behalf of this defendant, it would not alter the plaintiff's rights one whit. Suppose any one of these earlier alleged users of the word "Lady Fingers" pretended to by defendant claimed that he was the inventor of the word "Lady Fingers" (a preposterous assumption) and were to bring suit, we would have a case closely approximating and met by *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 Fed. 468 (8 C. C. A.), concerning the trademark "Antiphlogistine."

The term "Antiphlogistine" is a trademark that was adopted by the defendant, Denver Chemical Mfg. Co., and applied to a natural medicinal product sometimes called "Denver Mud." The plaintiff there claimed they had adopted it earlier and used it in

New York in a small way. In disproving of the plaintiff's claims the Court said (pages 473-474):

“The pharmacists did not recognize the word ‘Antiphlogistine’ as complainant’s brand. Not only so, but the limited sales of the preparation by any name indicate an unfamiliarity with it certainly as ‘Antiphlogistine.’ Ninety-eight different persons only inquired for it during the decade following the supposed adoption of the trademark in question, and the aggregate amount paid by them for all the purchases made amounted to the sum of \$514.18 only. There is no evidence in the record showing that complainant’s preparation was kept in drug stores generally for sale. On the contrary, the only fair inference from all the evidence is that it was manufactured in very small quantities, kept for sale exclusively by complainant, advertised little if any, sold infrequently and in small quantities, and most generally to dentists located in near proximity to complainant’s drug store, unknown to the trade generally by any name, and when known in the region where sold it was not known as ‘Antiphlogistine’ but ‘Macmahan’s Antiphlogistine.’ Such being the evidence, we are of opinion that complainant’s mixture had obtained no such acceptance or reputation in the trade under the name ‘Antiphlogistine’ as to confer upon complainant a right of property in that word alone. The test laid down by the supreme court, in cases *supra*, is not met. The use was not sufficient to ripen into a right of property. The mark ‘Antiphlogistine’ on any package would not have been recognized by the trade as evidence of its origin, or as an indication of complainant’s ownership. It follows that defendant’s large and prosperous business, innocently and at great expense organized and developed by the use of this same word under the circumstances shown by the proof, cannot be destroyed on complainant’s claim of a superior right thereto.”



So much for the domestic alleged prior uses on the Eiseman and Margarita vineyards.

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#### NO LACHES BY PLAINTIFF.

It is assumed that the defense of laches is based either upon the fact that after defendants were notified by plaintiff, the latter waited two or three years before beginning suit; or that there had been other sporadic infringements by parties unknown and other than defendants dating back possibly to 1916 or 1917. Of course, the appearance of the name "Lady Finger" in a publication like Webster's Dictionary in 1921 or in a legislative enactment is not an infringement *per se* and has no bearing on the question of plaintiff's laches, particularly where plaintiff had no notice of the same prior to the suit.

"To be sure, it was the duty of the appellee to enforce such right against those whom it knew, or of whom it had notice, were infringing. It cannot be chargeable with laches for failure to prosecute an infringement before it knows or has such notice as would lead an ordinarily prudent person to inquire and learn the existence of the infringement. *Kilbourn v. Sunderland*, 130 U. S. 505. 9 Sup. Ct. 594, 32 L. Ed. 1005." (*Wallace & Co. v. Repetti, Inc.*, 266 Fed. 307, 310.).

It is also important to observe in this connection that defendants have not been misled in any way by plaintiff's delay in instituting suit; nor have the defendants invested large sums of money in labels, advertising and good-will.

Plaintiff not only was always vigilant in asserting its rights but reasonably diligent in bringing suit

when plaintiff saw that defendants had no intention of heeding the warning.

Great latitude is allowed by the Courts in regard to trademarks, although there has been no delay here by plaintiff in bringing suit that bears even a semblance to laches. *Delay in bringing a suit in trademark cases is generally construed as a license terminable at will.*

The subject is ably discussed in the *Hunyadi* case (*Savlehner v. Eisner & Mendelson Co.*, 179 U. S. 19; 45 L. Ed. 60) where the Court said (p. 76):

“As applicable to trade-marks, two cases in this court are illustrative of this principle. In *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828, there had been apparently a delay of about twenty years in instituting proceedings, but the court observed that ‘equity courts will not, in general, refuse an injunction on account of delay in seeking relief where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits.’ An injunction was granted in this case, but it was held that by reason of inexcusable laches, the complainant was not entitled to an account of gains or profits. See also *Harrison v. Taylor*, 11 Jur. N. S. 408. An effort was made in *Memendez v. Holt*, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143, to obtain a consideration of the principle of *McLean v. Fleming*, so far as it was therein held that an injunction might be awarded, though the complainant were precluded by his delay from obtaining an account of gains and profits. But the Chief Justice observed: ‘**The intentional use of another’s trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent, and the wrong is**

a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself, \* \* \* nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right.' (Fullwood v. Fullwood, L. R. 9 Ch. Div. 176.) \* \* \* So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

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#### WILLFUL INFRINGEMENT.

As said by the Court in *Wallace & Co. v. Repetti, Inc.*, 266 Fed. 307, 310:

"The acts of the appellant here were indulged in, not only before, but after, full warning and with knowledge of the appellee's rights and its intentions. The appellant did not at any time modify its business conduct, but continued to infringe; and this was without the acquiescence or consent of the appellee. We think that under these circumstances the appellee was entitled to an accounting. *Garrett & Co. v. Schmidt, etc. Co.* (D. C.) 256 Fed. 943; *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 35, 104 C. C. A. 475; 32 L. R. A. (N. S.) 274."



### FRAUDULENT INTENT PRESUMED.

“The complainant notified the defendant in writing of his registered trade-mark, and requested it to cease its infringement, and it declined to do so. In suits for infringement of registered trade-marks, where the defendant has refused on notice to cease the use of an infringing device and has continued to infringe, neither a fraudulent intent to injure the complainant nor an actual misleading of the public need to be proved. They will be and are presumed. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 548, 549, 11 S. Ct. 396, 34 L. Ed. 997; *Church & Dwight Co. v. Buss* (C. C.) 99 F. 276, 279.”

(*Feil v. American Serum Co.* (C. C. A. 8th Circuit), 16 Fed. (2d) 88, at page 90.)

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### CONCLUSION.

We submit that the testimony is overwhelmingly in favor of the validity of plaintiff's trademark. That during over 30 years of steadily increasing production and advertising, this mark has come to indicate that grapes sold under the trademark “Lady Fingers” originate with the plaintiff and that defendants' unscrupulous adoption of the mark is a fraud on the public as well as upon the plaintiff.

Defendants' theory that because defendants chose to designate several varieties of elongated grapes by the term “Lady Fingers,” instead of detracting from plaintiff's right is, in fact, a tribute to plaintiff's originality, advertising and success. Defendants are free to ship their elongated grapes which may or may not resemble in appearance the “Lady Finger” grapes

of plaintiff under the term "Enchantress," if they want to use a trademark; or under the scientific names of "Rish Baba," "Cornichon," etc. Plaintiff does object to the use of the mark "Lady Fingers" as applied to any grapes whatever, whether better or worse than those grown or shipped by plaintiff, that do not originate with plaintiff.

Plaintiff has, during a long course of honorable dealing with the public and at great expense, built up a trade in "Lady Fingers" which represents to plaintiff a valuable asset and the defendants ought not by continued infringement be allowed to destroy this property right.

We submit that the decree should be reversed with costs to appellant and an order for an injunction and an accounting entered, together with an order for the surrender and destruction of all infringing marks, labels, wrappers, receptacles, etc., of defendants in accordance with Section 20 of the Trademark Act, *supra*.

Dated, San Francisco,  
May 25, 1929.

Respectfully submitted,

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

*Attorneys for Appellant.*

